



**6560-50-P**

**ENVIRONMENTAL PROTECTION AGENCY**

**40 CFR Part 52**

**[EPA-R04-OAR-2017-0371; FRL-9995-84-Region 4]**

**Air Plan Approval; Alabama: PSD Replacement Units**

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Final rule.

**SUMMARY:** The Environmental Protection Agency (EPA) is finalizing approval of revisions to the Alabama State Implementation Plan (SIP), submitted by the State of Alabama, through the Alabama Department of Environmental Management (ADEM), via two letters dated May 7, 2012, and August 27, 2018. The SIP revisions relate to the State's Prevention of Significant Deterioration (PSD) permitting regulations. In particular, the revisions add a definition of "replacement unit" and provide that a replacement unit is a type of existing emissions unit under the definition of "emissions unit." This action is being taken pursuant to the Clean Air Act (CAA or Act).

**DATES:** This rule is effective **[Insert 30 days after date of publication in the Federal Register]**.

**ADDRESSES:** EPA has established a docket for this action under Docket Identification No. EPA-R04-OAR-2017-0371. All documents in the docket are listed on the [www.regulations.gov](http://www.regulations.gov) web site. Although listed in the index, some information is not publicly available, i.e., Confidential Business Information or other information whose disclosure is restricted by statute.

Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically through [www.regulations.gov](http://www.regulations.gov) or in hard copy at the Air Regulatory Management Section, Air Planning and Implementation Branch, Air and Radiation Division (formerly the Air, Pesticides and Toxics Management Division), U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street, SW, Atlanta, Georgia 30303-8960. EPA requests that if at all possible, you contact the person listed in the **FOR FURTHER INFORMATION**

**CONTACT** section to schedule your inspection. The Regional Office's official hours of business are Monday through Friday 8:30 a.m. to 4:30 p.m., excluding Federal holidays.

**FOR FURTHER INFORMATION CONTACT:** Andres Febres, Air Regulatory Management Section, Air Planning and Implementation Branch, Air and Radiation Division (formerly the Air, Pesticides and Toxics Management Division), Region 4, U.S. Environmental Protection Agency, 61 Forsyth Street, SW, Atlanta, Georgia 30303-8960. The telephone number is (404) 562-8966. Mr. Febres can also be reached via electronic mail at [febres-martinez.andres@epa.gov](mailto:febres-martinez.andres@epa.gov).

## **SUPPLEMENTARY INFORMATION:**

### **I. Background**

On May 7, 2012, Alabama submitted for EPA approval amendments to its PSD permitting regulations as part of the State's New Source Review (NSR) permitting program, found in ADEM Administrative Code Rule 335-3-14-.04 – *Air Permits Authorizing Construction in Clean Air Areas [Prevention of Significant Deterioration Permitting (PSD)]*.<sup>1,2</sup> Subsequently,

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<sup>1</sup> EPA's regulations governing the implementation of the NSR permitting programs are contained in 40 CFR sections 51.160 through 51.166; 52.21, 52.24; and part 51, Appendix S. The CAA NSR program is composed of three separate programs: PSD, Nonattainment (NNSR), and Minor NSR. PSD is established in part C of title I of the

Alabama submitted a May 5, 2017, withdrawal letter clarifying the May 7, 2012, submittal. EPA issued a direct final rule — with a concurrent Notice of Proposed Rulemaking (NPRM) — on August 24, 2017, approving those changes. *See* 82 FR 40072 and 82 FR 40085, respectively. However, EPA received an adverse comment on that action, and subsequently withdrew its direct final rule approval of the May 7, 2012, submittal. *See* 82 FR 47397 (October 12, 2017). EPA is not finalizing the August 24, 2017, proposed rule.

Alabama later submitted a second revision to Rule 335-3-14-.04 on August 27, 2018.<sup>3</sup> Together, the May 7, 2012, and August 27, 2018, submittals, along with the State’s May 5, 2017, withdrawal letter, include revisions to Alabama’s PSD permitting regulations by adding a definition of “replacement unit” at Alabama Rule 335-3-14-.04(2)(bbb), and by modifying the definition of “emissions unit” to expressly include replacement units as existing emissions units at Alabama Rule 335-3-14-.04(2)(g).<sup>4</sup> In addition, Alabama’s August 27, 2018, SIP revision adds a fifth condition to the new definition of a “Replacement Unit” requiring any source qualifying as a replacement unit to use the actual-to-projected-actual test for PSD applicability at Alabama Rule 335-3-14-.04(1)(f). Alabama’s definition of “replacement unit,” and its provision defining a replacement unit as an “existing emissions unit” for purposes of PSD applicability, are

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CAA and applies in areas that meet the NAAQS – or “attainment areas” – as well as areas where there is insufficient information to determine if the area meets the NAAQS – or “unclassifiable areas.” The NNSR program is established in part D of title I of the CAA and applies in areas that are not in attainment of the NAAQS – or “nonattainment areas.” The Minor NSR program addresses construction or modification activities that do not qualify as “major” and applies regardless of the designation of the area in which a source is located. Together, these programs are referred to as the NSR programs.

<sup>2</sup> EPA notes that it received this SIP revision on May 16, 2012.

<sup>3</sup> EPA notes that it received this SIP revision on September 4, 2018.

<sup>4</sup> EPA is not taking action on the portions of Alabama’s May 7, 2012, and August 27, 2018, submittals regarding ADEM Administrative Code Chapter 335-3-10 – *Standards of Performance for New Stationary Sources*, and Chapter 335-3-11 – *National Emission Standards for Hazardous Air Pollutants*. In the cover letter for these SIP revisions, Alabama acknowledges that these regulations are not part of Alabama’s SIP and states that these regulations are not to be incorporated into the SIP.

consistent with Federal PSD regulations at 40 CFR 51.166.

In a NPRM published on March 29, 2019 (84 FR 11914), EPA proposed to approve the revisions to Alabama Rule 335-3-14-.04 included in the State's May 7, 2012, submittal, as amended by the May 5, 2017, withdrawal letter, and the August 27, 2018, submittal. Comments on the NPRM were due on or before April 29, 2019. EPA received one adverse comment during the comment period for this action and offers a response below.

## **II. Response to Comments**

The Commenter generally supports EPA's proposed approval of revisions to Alabama Rule 335-3-14-.04(2)(bbb) and Rule 335-3-14-.04(2)(g). However, the Commenter states that EPA must require revision of Alabama's SIP to remove a separate definition — the definition of “actual emissions” at Alabama Rule 335-3-14-.04(2)(u) — because that definition is “unlawful and arbitrary.” The Commenter further states that EPA constructively reopened its approval of the “actual emissions” definition when it proposed approval of the May 7, 2012, version of Alabama Rule 335-3-14-.04(2)(bbb) on August 24, 2017 (82 FR 40072).

EPA approved Alabama's definition of “actual emissions” on May 1, 2008 (73 FR 23957), and that approval is outside the scope of this action. Additionally, EPA disagrees that it constructively reopened its prior approval of the “actual emissions” definition through this action. Courts have explained that an agency reopens a prior action in two circumstances: (1) when it implicitly or explicitly solicits comment or otherwise indicates its willingness to reconsider such regulation by inviting and responding to comments; or (2) when the new rule increases the significance of the preexisting regulation, and thus significantly alters the stakes of

judicial review. *See Natural Resources Defense Council v. EPA*, 571 F.3d 1245 (D.C. Cir. 2009).

Neither of these circumstances is present here. First, as explained in our March 29, 2019, proposal, EPA withdrew the August 24, 2017, direct final rule and is not finalizing it, so the Commenter's assertions regarding that action are moot. Moreover, EPA did not cite to or otherwise refer to the provision raised in the comment, nor did it request public input on that provision in either its August 24, 2017, or March 29, 2019, proposals.

Second, EPA's action here does not increase the significance of Alabama's definition of "actual emissions," nor does it alter the stakes of judicial review of EPA's May 1, 2008 approval of that provision. Under the SIP revision EPA is finalizing here, sources qualifying as replacement units must use the actual-to-projected-actual test for determining PSD applicability, which relies on the "baseline actual emissions" of the source, rather than the "actual emissions" definition raised by the Commenter. In other words, no aspect of EPA's action today relies on or otherwise impacts the applicability or effect of Alabama's "actual emissions" definition. EPA also notes that, because it withdrew its August 24, 2017, direct final rule and is not finalizing that action, the action considered in EPA's August 24, 2017, proposed rule also does not impact the significance of Alabama's "actual emissions" definition.

For these reasons, EPA has not constructively reopened its May 1, 2008, approval of Alabama's definition of "actual emissions" and, therefore, that rulemaking is outside the scope of this action.

### **III. Incorporation by Reference**

In this document, EPA is finalizing regulatory text that includes incorporation by reference. In accordance with requirements of 1 CFR 51.5, EPA is finalizing the incorporation by reference of ADEM Administrative Code Rule 335-3-14-.04(2)(g) and 335-3-14-.04(2)(bbb), state effective on October 5, 2018. EPA has made, and will continue to make, these materials generally available through [www.regulations.gov](http://www.regulations.gov) and at the EPA Region 4 office (please contact the person identified in the “For Further Information Contact” section of this preamble for more information). Therefore, these materials have been approved by EPA for inclusion in the State implementation plan, have been incorporated by reference by EPA into that plan, are fully federally enforceable under sections 110 and 113 of the CAA as of the effective date of the final rulemaking of EPA’s approval, and will be incorporated by reference in the next update to the SIP compilation.<sup>5</sup>

#### **IV. Final Action**

EPA is approving changes to the Alabama SIP, that were provided to EPA through Alabama’s May 7, 2012 and August 27, 2018 SIP revisions, as well as the May 7, 2017 withdrawal letter. Specifically, EPA is finalizing approval of changes to ADEM Administrative Code Rule 335-3-14-.04(2)(g) and 335-3-14-.04(2)(bbb), in order to make Alabama’s PSD program consistent with Federal provisions and the CAA. This action is limited to the two rules currently before the Agency and does not modify any other PSD rules in Alabama’s SIP.

#### **V. Statutory and Executive Order Reviews**

Under the CAA, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable Federal regulations. *See* 42 U.S.C. 7410(k); 40

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<sup>5</sup> *See* 62 FR 27968 (May 22, 1997).

CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the CAA. These actions merely approve state law as meeting Federal requirements and do not impose additional requirements beyond those imposed by state law. For that reason, these actions:

- Are not a significant regulatory action subject to review by the Office of Management and Budget under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011);
- Are not an Executive Order 13771 (82 FR 9339, February 2, 2017) regulatory action because SIP approvals are exempted under Executive Order 12866;
- Do not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Are certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Do not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Public Law 104-4);
- Do not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Are not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Are not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);

- Are not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and
- Do not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

The SIP is not approved to apply on any Indian reservation land or in any other area where EPA or an Indian tribe has demonstrated that a tribe has jurisdiction. In those areas of Indian country, these rules do not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), nor will it impose substantial direct costs on tribal governments or preempt tribal law.

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing these actions and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the Federal Register. A major rule cannot take effect until 60 days after it is published in the Federal Register. These actions are not “major rules” as defined by 5 U.S.C. 804(2).

Under section 307(b)(1) of the CAA, petitions for judicial review of these actions must be filed in the United States Court of Appeals for the appropriate circuit by **Insert date 60 days**



**from date of publication in the Federal Register**]. Filing a petition for reconsideration by the Administrator of these final rules does not affect the finality of these actions for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed and shall not postpone the effectiveness of such rules or actions. These actions may not be challenged later in proceedings to enforce their requirements. *See* section 307(b)(2).

**List of Subjects in 40 CFR Part 52**

Environmental protection, Air pollution control, Carbon monoxide, Incorporation by reference, Lead, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, Volatile organic compounds.

Dated: June 7, 2019.

Mary S. Walker,  
Regional Administrator,  
Region 4.

40 CFR part 52 is amended as follows:

**PART 52 – APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS**

1. The authority citation for part 52 continues to read as follows:

Authority: 42.U.S.C. 7401 *et seq.*

**Subpart B—Alabama**

2. In § 52.50, the table in paragraph (c) is amended under Chapter No. 335-3-14 Air Permits by revising the entry for “Section 335-3-14-.04” to read as follows:

**§52.50 Identification of plan.**

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(c) \* \* \*

**EPA-APPROVED ALABAMA REGULATIONS**

State citation	Title/subject	State effective date	EPA approval date	Explanation
**	**	*	*	*
Chapter No. 335-3-14 Air Permits				
**	**	*	*	*

Section 335-3-14-.04	Air Permits Authorizing Construction in in Clean Air Areas [Prevention of Significant Deterioration Permitting (PSD)]	10/5/2018	[Insert date of Publication in <u>Federal Register</u> ] [Insert citation of publication]	<p>Except for changes to 335–3–14–.04(2)(w)1., state effective July 11, 2006, which lists a 100 ton per year significant net emissions increase for regulated NSR pollutants not otherwise specified at 335–3–14–.04(2)(w).</p> <p>Except for the significant impact levels at 335– 3–14–.04(10)(b) which were withdrawn from EPA consideration on October 9, 2014.</p> <p>Except for the second sentence of paragraph 335-3-14-.04(2)(bbb)2., as well as the second and fourth sentences of paragraph 335-3-14-.04(2)(bbb)3., which include changes from the vacated federal ERP rule and were withdrawn from EPA consideration by the State on May 5, 2017.</p>
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[FR Doc. 2019-14142 Filed: 7/2/2019 8:45 am; Publication Date: 7/3/2019]